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MUNICIPALITIES AS RIPARIAN OWNERS

By W. LEWIS ROBERTS*

With the rapid increase in our urban population the question of water supply becomes a pressing one for many of our municipalities. Property values have increased along lakes and streams and the expense of securing rights under eminent domain proceedings is very great. It becomes important, therefore, to know just what rights, if any, a municipality situated on a stream or lake has as a riparian owner. Of course a city has no right to take a supply of water from a stream on which it is not situated without compensating riparian owners for damage done thereby.¹

Now suppose a city located in the vicinity of a river acquires a tract of land along the river for the purpose of getting a water supply without compensating lower owners who are injured, would the fact that it had become a riparian owner in such a case give it the right to take water for supplying its inhabitants? It is clear that this would be a non-riparian use of the water and would not be allowed. Such a case was that of the *City of Emporia v. Soden*² where the municipality purchased land adjoining and above the mill pond of the plaintiff and extending to the center of the river. It dug wells near the shore and also ran one pipe into the pond and took water therefrom for its citizens. The court laid down the general principle, "that whatever of benefit, whether of power or otherwise, comes from the flow of water in the channel of a natural stream, is a matter of property and belongs to the riparian owner, and is protected in law as fully as the land he owns. It cannot be taken for private use except by his consent, and for public use only upon due compensation."

The law required that a riparian owner make a reasonable use of the water flowing over his land. He may supply his domestic needs without regard to the effect upon a lower owner and by the later cases he may also use for irrigating or manufacturing, but this use must be in connection with the land through which the stream runs.³ The question of non-riparian

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¹ *Stein v. Burden*, 24 Ala. 130; *Irving v. Media*, 10 Pa. Super. Ct. 132, affirmed 194 Pa. 648; *Aetna Mills v. Waltham*, 126 Mass. 422.

² 25 Kan. 588, 37 Am. Rep. 265.

³ *Meng v. Coffey*, 67 Neb. 500, 93 N. W. 713.

use has often come up in railroad cases where water has been taken for supplying locomotives as in *Garwood v. New York Central Ry. Co.*⁴ There the court enjoined the railroad, a riparian owner, from taking water for this purpose. Where the water is not to be used in connection with the land that is riparian, the diversion cannot be brought within the general rule that a riparian owner must make a reasonable use of the water for irrigation and domestic purposes.⁵ The question of whether it is a reasonable use has been held a question of fact for the jury.⁶ The court in *Stein v. Burden*⁷ in regard to the point under consideration said:

“The City of Mobile is not located upon the creek; it is from three to five miles distant. To hold that a municipal corporation can, from the mere fact of owning land upon a water-course, acquire the right to divert the water in sufficient quantities to supply the domestic wants of its inhabitants residing at a distance of from three to five miles, to the injury of the other proprietors, would be unreasonable in itself, and unjust to those who have an equal right to participate in the benefits of the stream.”

Where a town or city is situated on the stream the decisions are not in accord. In California the old Spanish and Mexican rule prevails. After a long line of decisions in that State it was finally held in *Los Angeles v. Hunter*⁸ that the city as successor of the Mexican Pueblo de los Angeles had a right to a public water supply from the Los Angeles river which flows through the city and to have a right to the whole river as against private riparian owners. The city was allowed to enforce this right to the extent of enjoining landowners in the upper San Fernando valley from sinking wells and cutting off the underground water that seeped into the river.⁹

In Minnesota the court in the case of *Minneapolis Mill Co. v. Water Commissioners*,¹⁰ held that the rights of riparian own-

⁴ 83 N. Y. 400.

⁵ *Meng v. Coffey*, 67 Neb. 500.

⁶ *Snow v. Parson*, 28 Vt. 459; *Hayes v. Walden*, 44 N. H. 580.

⁷ 24 Ala. 130.

⁸ 156 Calif. 603, 105 Pac. 755.

⁹ Waters: American Law and French Authority, Samuel C. Will, 33 H. L. R. 157.

¹⁰ 58 N. W. 33.

ers on navigable or public streams of water are subordinate to public uses of such water, and the public has a right to apply the waters of a navigable river to public uses without making compensation to riparian owners. This case was carried to the United States Supreme Court and the findings of the State Court sustained on the ground that the local state law as to riparian rights should prevail.¹¹

There are a few decisions in other states that support the view of the Minnesota court to the effect that if the state owns the bed of the streams, the riparian owner has no right to the flow of the stream in its natural condition as against the state or one acting under the authority of the state.¹²

At common law, however, the title to the bed in all streams that were non-tidal was in the riparian owner. This definition of a public stream simplified matters and as not many of our rivers are tidal at any great distance from their mouths it would seem that the question would seldom or never come up, especially in our inland jurisdictions. But the courts have confused the test of the presence of tide with navigability and in this country the line is generally drawn between streams that are navigable in fact and those that are not navigable, and the title to the bed in the former is held to be in the state.

The Kentucky court early adopted the common law test and held in *Berry v. Snyder*¹³ that as the tide does not ebb and flow in the Ohio river, Kentucky riparian owners own to the thread of the stream and in a conveyance of their land the fee passes to the center of the river. In this state then it would seem that water cannot be taken from a river on the ground that it is a public stream, without compensation to the riparian owners for injury thereby caused.

When we consider whether a municipality situated on a stream can exercise the rights of a riparian owner as such and take water from the stream, and supply its inhabitants therewith for domestic uses without compensating lower riparian owners for the damage caused; we find two views expressed in the decisions. The one outstanding decision that cities so situated may exercise the rights of a riparian owner is that of the Ohio court

¹¹ 168 U. S. 349.

¹² 1 Tiffany, Real Property, 2nd Ed. 1132.

¹³ 3 Bush 266.

in the *City of Canton v. Shock*.¹⁴ The city of Canton took water from the stream on which it was situated and supplied its inhabitants with water for domestic, commercial and manufacturing purposes at a price fixed by the city, so as to produce an income sufficient to meet expenses of the water system. The water supply of the plaintiff below for running his grist mill was thereby impaired and he sued for damages. The court on appeal took the view that the city was acting within its rights as a riparian owner and plaintiff could not recover. It said:

“While the inhabitants own their lots individually, the city owns the streets, the fire department, and all other public property and public works, and, in its corporate capacity, provides for the convenience and welfare of its inhabitants as to streets, fire protection, lighting, and supplying water; and in such and other like matters the city overshadows the individuals and stands in its corporate capacity as a single proprietor extending throughout its entire limits, and entitled, as such, to all the rights, and subject to all the liabilities, of a riparian proprietor on the stream upon which it is situated. Sound reason, the weight of authority, and the present advanced state of municipal government, rights, and liabilities, require that a municipality should be held and regarded, in its entirety, as an individual entity, having in its corporate capacity the rights and subject to the liabilities, of a riparian proprietor; and we so hold in this case. . . .”

“The city having the right to supply water to its inhabitants for domestic and manufacturing purposes, it can make no difference in that right that the supply is for pay, rather than for nothing. The injury, if any, to the lower proprietor, arises from the taking of the water, and not from the pay received therefor. . . .”

“The water taken by the city from the stream for its own use, and so supplied to its inhabitants, is taken by virtue of the right of eminent domain, and therefore no compensation need be made therefor. . . .”

“If the upper proprietors have grown so large or become so numerous as to consume most or all of the water, the lower proprietors have no cause of complaint, because it is only what

¹⁴ 66 Ohio St. 19, 53 L. R. A. 637, 90 Am. St. Rep. 557, 63 N. E. 600.

they should have reasonably expected in the growth and development of the country, and subject to which contingency they established their water powers."

This view is fortified by dicta from two Pennsylvania decisions. In *Philadelphia v. Collins*¹⁵ it is said: "Every individual residing upon the banks of a stream has a right to the use of the water to drink and for the ordinary uses of domestic life; and where large bodies of people live upon the banks of a stream, as they do in large cities, the collective body of the citizens has the same right, but of course, in a greatly exaggerated degree."

The case of *Barre Water Co., Appt. v. Carnes, et al.*¹⁶ is cited as a decision supporting the view of the Ohio court but the facts do not support such a use of the case although the language used by Judge Start, who gave the opinion of the court, goes as far as the Ohio court's decision. The defendant in the court below was exercising a prescriptive right that had been gained by its assignor. Speaking of the rights of inhabitants of cities and towns located on the banks of streams to take water therefrom for domestic uses Judge Start says:

"Dwellers in towns and villages, watered by a stream may use the water for domestic purposes to the same extent that a riparian owner can, provided they can reach the stream by a public highway, or secure a right of way over the lands of others. It is immaterial how the dwellers on the stream take the water for the purposes for which they may lawfully use it. They can drive their cattle to the stream, and allow them to quench their thirst, and can carry water in pails to their homes; or each individual can carry the water in a pipe to his dwelling for such use, provided he can secure a right of way for that purpose; or the dwellers on the stream may combine their funds to procure cheaper and better transportation by means of a pipe, and may use the water for their several necessities, to the same extent that they could if it flowed past their dwellings in a natural channel."

This is, to say the least, in marked contrast to the generally accepted common law doctrine that a city as such is not a riparian owner, but only its lot owners who front on the stream.¹⁷

¹⁵ 68 Pa. 116, quoted in *Barre Water Co. v. Carnes*, 65 Vt. 626.

¹⁶ 65 Vt. 626, 21 L. R. A. 769, 36 Am. St. Rep. 891, 27 Atl. 609.

¹⁷ Farnham, *Waters and Water Rights*, 603, 609-612; 40 Cyc. 764-765.

The two cases most often cited in support of this latter view are *Stein v. Burden*¹⁸ and *Emporia v. Soden*.¹⁹

In the former decision the court said: "That a riparian proprietor has the right to consume even the whole of the water of a stream, if absolutely necessary for the wants of himself and family, has received the sanction of judicial decision: *Evans v. Merriweather*, 3 Scam. 496 (38 Am. Dec. 106); *Arnold v. Foot*, 12 Wend. 330; but if this doctrine be correct, it can have no application in the present instance, because it rests upon reasons which are wholly inapplicable to corporations, which are artificial bodies, and can have no natural wants."

The court in the latter case, *Emporia v. Soden* said, "A second matter of defense is this: While the undiminished flow of the stream is conceded to be the right of every riparian owner, yet this right has always been limited to this extent, that each riparian owner may, without subjecting himself to liability to any lower riparian owner, use of the water whatever is needed for his own domestic purposes and the watering of his stock. The city is a riparian owner, and whatever it uses, little or much, it is simply taking for domestic purposes. Each individual citizen of Emporia may buy land on the banks of the river and then take for domestic uses whatever amount of water he needs. What the individuals separately may do, the city representing all the individuals has done This argument is plausible, but not sound. . . ."

"The city, as a corporation, may own land on the banks, and then in one sense be a riparian owner. But this does not make each citizen a riparian owner."

In *Whatcomb v. Fairhaven Land Co.*,²⁰ it was decided that a municipality which owned land on the shore of a navigable lake could not appropriate a water supply to the injury of owners of land situated on the non-navigable outlet of the lake, who had acquired vested rights. And Judge Bird in his opinion in the case of *City of Battle Creek v. Gognac*²¹ said: "As a riparian owner, the complainant (city) has no right to divert the water for the purpose of selling it to the inhabitants of Battle Creek." The Michigan courts also decided the case of *Stock v. City of*

¹⁸ 24 Ala. 130, 60 Am. Dec. 453.

¹⁹ 25 Kan. 588, 37 Am. Rep. 265.

²⁰ 24 Wash. 493, 54 L. R. A. (N. S.) 190.

²¹ 181 Mich. 241, 148 N. W. 441.

*Hillsdale*²² where it was held that a city has no right to divert water as an upper riparian owner and to pump it out of a lake for the use of citizens generally and to supply manufacturing establishments within its limits. A similar conclusion was also reached by the New Jersey Court of Chancery in *Higgins v. Fleming Water Co.*²³ and by the Pennsylvania court in *Irving's Executors v. Media*.²⁴

To recapitulate, we have seen that in California municipalities that have succeeded to old Mexican pueblo rights, as in the case of Los Angeles, at least, may appropriate the flow of streams on which they are situated for the domestic uses of their inhabitants if necessary. In Minnesota and possibly two or three other jurisdictions if cities are situated on public streams, it seems they may supply their inhabitants with water from such streams without compensating lower riparian owners for any damage caused thereby. Then we come to the question whether a municipality located on a stream can claim the ordinary rights of a riparian owner as such and supply the domestic needs of its inhabitants without having to resort to eminent domain proceedings and compensating lower owners for injuries caused by taking the water. There is dicta both ways and the Ohio case is squarely in point to the effect that a city does have this right and there are several decisions like those of Alabama and Kansas that municipalities do not have the rights of riparian owners from the fact that they are situated on streams.

In conclusion it is safe to say that in states where the question has not been passed upon the courts are free to follow the decision of the Ohio court and to hold that municipalities need not compensate lower riparian owners even if it becomes necessary to take the entire flow of water from a stream for a municipal water supply. Since the common law seems clear that a riparian owner has such a property right in a stream as entitles him to have the water flow in its natural way less a slight diminution caused by upper riparian owners making a reasonable use of the water, the Ohio decision seems to have the effect of taking property without due compensation and to be contrary not

²² 155 Mich. 375, 119 N. W. 435.

²³ 36 N. J. Eq. 538.

²⁴ 194 Pa. St. 648, 45 Atl. 482.

only to our Constitution but to our sense of what is just and right. It therefore seems safe to predict that this decision will never have a wide following and that municipalities, as such, will not be given the rights of riparian owners simply from the fact that they are situated on rivers.

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